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No. 311

In the Supreme Court of the United States

OCTOBER TERM, 1958

RAY EDWARD GONDRON AND DANIEL ELCHUK,
PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 21-26) is reported at 256 F. 2d 205. The opinion on the prior appeal (Pet. 28-29) is reported at 242 F. 2d 149. Opinions of the district court (Pet. 30-37) are reported at 159 F.Supp. 689 and 691.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1958. Rehearing was denied on July 30, 1958. The petition for a writ of certiorari was filed

on August 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether a plea of former jeopardy is properly overruled where the first conviction was appealed by petitioners and reversed and remanded for new trial on the government's confession of error.

STATEMENT

In September, 1956, in the United States District Court for the Southern District of Texas, petitioners were convicted on an indictment alleging a violation of 26 U.S.C. 4744(a) by failing to pay transfer tax after acquiring marihuana. On appeal, the Government filed a Motion to Remand for New Trial admitting that the testimony of one of its witnesses was questionable and possibly untruthful, and stating that, under the circumstances, the dignity of the United States would not permit the conviction to stand (Pet. 39-40). The Court of Appeals reversed and remanded for a new trial, saying, "The result is that the relief sought by the appellants, the reversal of the judgments, is granted as prayed for by each of them". (Pet. 28-29; 242 F. 2d 149).

In the trial court, the petitioners raised a plea of former jeopardy against a second trial, alleging that they had not acquiesced in the motion of the Government (R. 7-8). This plea was overruled (R. 10, 192-193; Pet. 34-37). A second conviction was obtained and appealed (R. 175-176, 183-186). The Court of Appeals affirmed this second conviction (R. 200-207; Pet. 21-26).

ARGUMENT

Petitioners' argument that in some manner they did not "acquiesce" in the disposition of their first appeal is best answered by the opinion of Judge Allred denying petitioners' plea of former jeopardy (Pet. 36):

> * * * Elchuk's conviction was reversed on his appeal, and he acquiesced in it. He got the relief he asked—reversal of the judgment. He did not even move for rehearing in the Court of Appeals and ask for acquittal there because of insufficient evidence as was done, without success, in *Bryan* v. *United States*,* cited in the *per curiam* opinion.

Petitioners recognize that if the reversal of their first conviction had resulted solely from their appeal, they would have no standing to claim double jeopardy. They argue, nevertheless, that because the government agreed to a reversal of the conviction, they were put in jeopardy by the second trial. There is no merit in this contention.

As the district court pointed out, the relief which petitioners sought on the first appeal was the relief which they obtained—reversal of the judgment of conviction. The fact that the government made it easier for them to achieve that result does not alter the fact that they were the ones who, by appealing, sought reversal. As the district judge further pointed out, petitioners so far acquiesced in the result that they did not even ask the Court of Appeals, on the first appeal, to enter a judgment of acquittal, rather than remand for a new trial. Their attempts to draw metaphysical distinctions between judgments "set

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* *Bryan* v. *United States*, 338 U.S. 552 (footnote added).

aside" and "reversed" does not aid them. Since they sought a readjudication of a conviction, they waived any right to plead former jeopardy.

In *Bryan* v. *United States*, 338 U.S. 552, petitioner complained that the Court of Appeals had no right to remand his case for a new trial when they might have granted his contention that he was entitled to a judgment of acquittal. He argued that his right to invoke the plea of former jeopardy arose when his right to a judgment of acquittal accrued in the appellate court. The former jeopardy aspect of the case was extensively treated in the briefs for both parties, yet the Court disposed of the matter as follows (338 U.S. 552, 560):

> Petitioner's contention that to require him to stand trial again would be to place him twice in jeopardy is not persuasive. He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal. ". . . where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial".

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

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SEPTEMBER, 1958.

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